

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID SUMMERS,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	CIVIL ACTION NO. H-05-4272
	§	
KENNETH REILLY, DWIGHT CANTRELL,	§	
DIANE DOTTAVIO, AND THE	§	
CITY OF MONTGOMERY,	§	
<i>Defendants.</i>	§	

MEMORANDUM AND ORDER

Kenneth Reilly has filed a third motion to dismiss (Dkt. 37) David Summers's complaint.¹ Having considered the parties' submissions and law, the court concludes that Reilly's motion should be denied.

This court previously ruled that Summers had not stated a claim for violation of a liberty interest protected by the Fourteenth Amendment, but permitted Summers a final opportunity to amend his complaint in good faith to state a claim against Reilly. In his Second Amended Complaint (Dkt. 35), Summers alleges that he was arrested by the bailiff acting under Reilly's direction. Summers further alleges that the ordeal caused him to suffer a heart attack.

¹ The parties now have consented to the jurisdiction of this magistrate court for all purposes, including final judgment. Summers's claims against the City of Montgomery have been dismissed (Dkt. 34).

The standard for dismissing a case for failure to state a claim under Federal Rule 12(b)(6) is well established. In short, the complaint must be liberally construed in favor of the plaintiff and all well-pleaded facts must be taken as true. *Priester v. Lowndes County*, 354 F.3d 414, 418 (5th Cir. 2004) (citing *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997)).

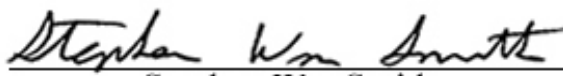
Reilly moves for dismissal on the grounds that Summers's new factual allegations are not made in good faith, are contrived in an effort to comply with the court's legal analysis in its prior memorandum and order, and do not state a claim against Reilly, who did not personally make any arrest.

Reilly's arguments are more appropriate for summary judgment. Summers alleges that Reilly acted under color of state law, outside of his judicial capacity and in the absence of all jurisdiction. Summers further alleges that Reilly violated Summers's rights under the Fourteenth Amendment by causing his arrest without jurisdiction or cause. Reilly cites no authority for the proposition that he cannot be liable under § 1983 for false arrest as a matter of law because only a peace officer can effect an arrest. There is authority for the proposition that "one who directs or assists an unlawful arrest may be liable." *Gordon v. Degelman*, 29 F.3d 295, 298 (7th Cir. 1994) (citing *Kilbourn v. Thompson*, 103 U.S. 168, 200 (1880)). This issue is not ripe for determination on the current record.

The court will not assume that the new facts alleged by Summers are contrived simply because they were not previously asserted. The court assumes that Summers's counsel is

aware of his obligations under Rule 11 of the Federal Rules of Civil Procedure. Whether or not Summers can prove facts to support these assertions will be decided on summary judgment or at trial. Therefore, Reilly's motion to dismiss (Dkt. 37) is denied.

Signed at Houston, Texas on November 17, 2006.



Stephen Wm Smith
United States Magistrate Judge